

brought into force on 1st August, 1960, by section 11 saved all proceedings by or on behalf of the Government against any person in respect of any matter whatsoever. In my opinion, even if the Emergency Regulations had expired by effluxion of time, section 11 of Act No. 24 of 1960 would have preserved the rights of the Government to institute prosecutions and enforce penalties. For these reasons I hold that a prosecution would now lie for an offence committed under the Emergency Regulations, 1948 when the Regulations were in force.

I shall now deal with the charge and the order of the learned President. In my opinion the charge was very badly drafted. In this respect I would commend all Presidents of Sessions Courts and Magistrates to read and digest the observations of the learned Chief Justice. In his oral judgment in *Public Prosecutor v. Syed Bakri* ⁽⁶⁾ (Ipoh Criminal Revision No. 3 of 1955 — unreported) his Lordship said: "I have repeatedly emphasized that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and the Magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case," as it has come to light in this appeal. The learned President acquitted and discharged the respondent after hearing the submission made by defence counsel and without recording any further evidence. In my opinion the learned President was wrong in making that order. Section 173(g) of the Criminal Procedure Code reads: "Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless." Section 173(g) read in conjunction with section 173(f) would appear to mean that the Court cannot acquit and discharge an accused person unless and until the case for the prosecution is closed. The learned President should have only discharged the respondent.

The appeal is therefore allowed. The order of the learned President is reversed and the case be sent back to the Sessions Court, Kuala Lumpur for retrial.

Order accordingly.

Solicitors: *Eugene Lye & Hoh.*

LIM THONG ENG v. SUNGEI CHOH RUBBER CO. LTD.

[O.C.J. (Ong J.) August 28, 1961]

[K.L. — Civil Suit No. 408 of 1960]

Machinery — Machinery Enactment (Cap. 202), s.4 — Personal injuries — Breach of statutory duty under rule 30(i) and (vi) — Assessment of damages.

Practice and Procedure — R.S.C., 1957, O.19 rr.19 and 27.

The plaintiff claimed damages for personal injuries sustained whilst working in the defendant's rubber factory as a result of the defendant's negligence or breach of statutory duty under rule 30(i) and (vi) of the safety rules made under section 4 of the Machinery Enactment (Cap. 202).

Held: (1) the plaintiff was employed by an independent contractor and consequently there was between the plaintiff and the defendant no relationship of master and servant or employer and employee nor even a contract for services. The defendant thus owed the plaintiff no duty of care at common law and the claim for negligence fails;

(2) there was a breach of statutory duty by the defendant and that rule 30(vi) covers the plaintiff.

Cases referred to:—

(1) *Mitchell v. North British Rubber Co. Ltd.* [1945] S.C. (J) 69, 73.

(2) *Cavanagh v. Ulster Weaving Co. Ltd.* [1959] 3 W.L.R. 262, 273.

(3) *Lavender v. Diamints Ltd.* [1949] 1 K.B. 585.

(4) *John Summers & Sons Ltd. v. Frost* [1955] A.C. 740, 753.

(5) *Smith v. Cammell, Laird & Co. Ltd.* [1940] A.C. 242.

ACTION FOR DAMAGES.

P. G. Lim (Miss) for the plaintiff.

A. P. Godwin for the defendants.

Cur. Adv. Vult.

Ong J.: The plaintiff's claim is for damages for personal injuries sustained whilst at work in the defendant's rubber factory as a result of the defendant's negligence or breach of statutory duty, under rule 30(i) and (vi) of the safety rules made under section 4 of the Machinery Enactment (Cap. 202).

The date of the plaintiff's injury was March 27, 1959 but the regulations currently in force under the Machinery Ordinance, 1953, were not made and published until August 26, 1959, by L.N. 284, so that the former rules remain applicable in this case by virtue of section 38(e) of the Ordinance.

On March 27, 1959, the plaintiff, then a 32-year-old creping machine operator of some ten years' experience, was at work on the second of a battery of five machines in the defendant's factory. While so engaged his left hand was caught in the nip of the rolls and crushed,

leaving only the proximal phalanges of the thumb and little finger, while the skin of most of the hand was also removed. He was in hospital until May 5, 1959. The limb being totally useless after healing of the wound, he took the advice of the Orthopaedic Surgeon, and on September 9, 1959 underwent an amputation of the lower third of the forearm in order that functional capacity of the disabled limb might be improved by being fitted with an artificial arm.

The defendant's factory is equipped with a battery of five power-operated creping machines for milling coagulum which I understand is coagulated lump foam rubber. The first machine is called a macerator and the others are creping machines, but they all come within the generic term "sheeting machinery" in rule 30(vi). Each machine is of the ordinary horizontal two-roll type, each roll being 12 inches in diameter and the rear roll is on a slightly higher plane than the front roll. A platform guard is fitted to each machine, being a metal tray of standard type measuring 30 inches from the nip of the rolls to the opposite end from which the operator feeds the rubber being processed. The front edge of the platform guard stands at the regulation height of 3 feet 3 inches above ground level. There are flanges on each side of the platform guard, narrow in front nearest the operator and progressively widening to a maximum of 9 inches at the end next to the rolls. The platform guard serves both the function of a tray and a safety device, and, according to Mr. E. C. Charlton, the Acting Chief Inspector of Machinery, "the sides are fitted more as a guide to keep the rubber on the platform." The type of machine and platform guard used can be clearly seen from the photographs in Ex. P1 and the diagram in the First Schedule to the Machinery (Driven Machinery) Regulations 1959: vide L.N. 284.

It is not clear how the accident happened. An inquiry was held by the Inspector of Machinery on June 16 and 18, 1959, at which evidence on affirmation was given by the plaintiff and others. This evidence was put in by consent (Ex. P2). The plaintiff had then stated that he was standing on the ground at the feed end of the tray and feeding a long sheet of rubber which had passed through the first machine. He lifted the end of the sheet, placed it on the tray and pushed it towards the nip of the rolls by holding it on both sides about 6 inches from its end. As soon as he felt the sheet caught by the nip of the rolls he let go, but he was unable to give any account of how his left hand also came to be caught in the nip.

The evidence which he gave in this Court was somewhat different. It appears to me that he had been casting about for an explanation to proffer as to the cause of the accident because he thought he had to do so. Briefly, it was to the effect that the first machine being out of

order, he had to feed into his machine more unwieldy lumps of cut coagulum of irregular thicknesses which had not passed through the macerator, and one such piece having stopped going through the rolls for want of grip, he was re-feeding it into the machine from another angle with a thinner end, while standing near the right corner of the platform guard. Because the rolls were slow in gripping, he had to use some force, pressing the rubber down against the tray, and forward, and while so doing his fingers got caught. In my opinion this explanation, put forward so tardily and so widely at variance with his previous account, deserves scant credit; all the more so because it can possibly be true only if the macerator was out of order, which is contrary to the evidence of his own witness, Veeriah, among others.

However, the precise circumstances in which the plaintiff's hand came to be caught in the nip is not one of those facts which lies on him to establish in order to sustain this action. As in cases in England under section 14 of the Factories Act, 1937, safety rules under the Machinery Ordinance, requiring dangerous machinery to be securely fenced, are not confined in their application only to the "prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part:" see *Mitchell v. North British Rubber Co. Ltd.*⁽¹⁾. Moreover, it is not necessary for me to consider any question of contributory negligence, because when I invited Mr. Godwin, counsel for the defendant, to consider whether he intended to raise any defence of contributory negligence which had not been pleaded, he elected to rest his case on the pleadings as they were.

The defence itself is an egregious example of evasiveness drawn without any regard for the provisions of R.S.C. O.19 r.19. It contained not even an adumbration of the defendant's grounds for denying liability but left them to wild surmise. Had an application been made under O.19 r.27 I should have had no hesitation in striking it out. Mr. Godwin, however, has clearly indicated — when asked by me to state with reasonable precision what the defiance was — that the answer to both heads of claim is that the plaintiff was the employee of an independent contractor. I should add that Mr. Godwin himself was not responsible for the pleading. The issues being thus resolved, I turn first to the claim based on negligence at common law. "The ruling principle," says Lord Keith of Avonholm in *Cavanagh v. Ulster Weaving Co. Ltd.*⁽²⁾, "is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulae must be taken subject to this principle." The evidence of the plaintiff himself, that he was employed and paid by Yeoh Ah Sai, and the evidence of Yeoh Ah Sai, that he employed the plaintiff and others to work in the

defendant's factory pursuant to a contract between himself and the defendant which fixed his remuneration according to the weight of dry rubber processed, clearly establishes that the plaintiff was employed by an independent contractor. Consequently, there was between the plaintiff and the defendant no relationship of master and servant, or employer and employee, nor even a contract for services. The defendant thus owed the plaintiff no duty of care at common law and the claim for negligence fails.

As to the alternative claim based on breach of statutory duty the relevant Safety Rules are:

"30.(i) No machinery shall be operated unless and until all moving parts are so shielded or fenced as to obviate danger to the public and to the persons employed by the owners of such machinery.

(ii) Such shielding or fencing shall be fitted by the owner to the satisfaction of the Inspector who shall give special attention to . . . parts of machinery which may be dangerous unless shielded or fenced.

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(vi) In all installations of sheeting machinery where the hands of the operator or operators must, for the efficient working of the machine, be exposed to contact with the moving rollers, a suitable guard shall be fitted to the satisfaction of the Inspector; such appliance shall positively prevent the hands of the operator or operators being brought into dangerous proximity to the point of contact or mesh of the rolls."

I do not think it necessary to discuss rule 30(i), although it has been urged by Miss P. G. Lim, that the plaintiff is entitled to invoke this sub-rule as a member of the public. Sub-rule (vi) in my opinion adequately covers the plaintiff. Whereas sub-rule (i) refers to "persons employed by the owners of such machinery," sub-rule (vi) uses the term "operator or operators," without any words of limitation or qualification. The expressions of similar import used in the Factory Act, 1937, have been held to cover, under section 26, an independent contractor working in a factory (see *Lavender v. Diamints Ltd.*⁽³⁾) and all persons working in a factory, whether employed by the occupier or not (see *John Summers & Sons Ltd. v. Frost*,⁽⁴⁾ and cf. *Smith v. Cammell, Laird & Co. Ltd.*⁽⁵⁾). In this case the plaintiff was an operator for a sheeting machine in the defendant's factory who was there lawfully in pursuance of a contract between the defendant and the plaintiff's employer which contemplated the employment of machine operators. He is clearly one of those for whose protection the safety rules were made. To quote Viscount Simonds in *Summers' case*: "It appears to be an illegitimate method of interpretation of a statute whose dominant purpose is to protect the workmen, to introduce by implication words of which the effect must be to reduce that protection." In *Smith v. Cammell, Laird & Co. Ltd.*, *supra*, Lord Atkin said, at p. 258:

"The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well known feature of this class of Mines Acts, and in the Factory Acts themselves. A striking example, as was pointed out by Mr. Shawcross in his powerful reply, is to be found in the obligation

A to fence dangerous machinery which in the Act of 1901 is to be found in section 10. It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another."

It only remains, therefore, to consider:
B first, whether there was an omission to equip the machinery with such appliance as "shall positively prevent the hands of the operator being brought into dangerous proximity to the point of contact or mesh of the rolls;" secondly, whether the plaintiff's injury was a direct consequence of the defendant's failure to instal such appliance. The answer to both questions must, according to plain common sense, be in the affirmative.

On the first point, I would observe that the sub-rule imposes on the machine owner an absolute liability. That the platform guard was not an appliance which complies with the requirements of sub-rule (vi) is manifest from the following evidence of Mr. Charlton, the Inspector of Machinery.

"A short man with short reach would not reach near enough to the rollers. I have known of some short operators feeding the rollers from beside the platform guard rather than from the front. That was particularly prevalent when the platform guards were first fitted — they came into general use some time around 1953. To prevent operators working from the side, which would be dangerous, there are two courses available: (1) to warn the operator, (2) to make the sides higher. The sides of the platform guards as fitted and shown in the photographs would not prevent an operator working from the side and getting his fingers nipped. The sides in fact are fitted here more as a guide to keep the rubber on the platform."

F Both the contractor, Yeoh Ah Sai, and his factory "kepala," Teh Kah Hoey, were equally aware of the danger arising when an operator stands to one side of the platform guard when feeding rubber into the rolls. Not only the plaintiff, but other workers had been observed doing so. I am, therefore, satisfied that nothing had been done to prevent a danger which was not only foreseeable but well known.

H The fact that the Inspector of Machinery was satisfied with the platform guard as an adequate safety appliance is entirely immaterial. His opinion does not conclude the matter and I am not bound to accept in substitution for my independent judgment his interpretation of what constitutes sufficient compliance with statutory requirements. As Lord Cooper said in *Mitchell v. North British Rubber Co. Ltd.*, *supra*:

I "The necessary and sufficient condition for the emergence of the duty to fence . . . is that some part of some machinery should be 'dangerous'. The question is not whether the occupiers of the factory knew it was dangerous; nor whether a factory inspector had so reported, nor whether previous accidents had occurred; nor whether the victim of these accidents had, or had not, been contributorily negligent. The test is objective and impersonal."

What I think most cogent evidence with regard to this question of fact is that the answers by

Mr. Charlton to my own questions disclose that the tendency or temptation of operators of short stature is to feed the rollers from beside the platform guard, which is admittedly a dangerous practice, and that raising the height of the sides of the platform guard would positively have prevented the hands of the operator being brought into dangerous proximity to the point of contact or mesh of the rolls. This precautionary measure has the virtues of simplicity, economy and effectiveness. It is a requirement obvious even to the layman without any mechanical experience. The plaintiff is a short man with a short reach who was, on that account, more liable to feed rubber into his machine from the side of the tray. The defendant's neglect or omission to take a simple precaution so plainly indicated leaves no doubt in my mind that the defendant was in breach of its statutory duty.

On the second point, it was not disputed that the plaintiff's hand was crushed because the machine had no effective guard to prevent his hand being brought into dangerous proximity with the rollers. Consequently, the absence of such a guard was the effective cause of the injury. From where he stood, near the corner of the platform guard, a slight alteration of his stance could easily have placed him in a position to feed the rollers from the side of the tray and this was probably what did happen. He might have been and probably was careless or unthinking in so doing. It was much less tiresome not to have to stretch his arms to their maximum reach, especially as it must have been dull and monotonous in the extreme to have to perform certain set motions hour after hour, and day after day, in a mechanical manner. Therefore no question of contributory negligence arises on the facts, apart from its not being raised in the defence. On this alternative ground of claim I accordingly held the defendant liable.

As regards damages the plaintiff claims by way of special damage a sum of \$298 for travelling expenses, which has been agreed. There is a further claim for loss of wages at \$120 per month for 18 months, from March 27, 1959 to September 27, 1960, and continuing. He was daily paid worker at \$4 a day, plus overtime. On the evidence I think a sum of \$96 would fairly represent an average month's income. He ought to have mitigated his losses, but appears to have made no attempt to do so. He might have earned less than his usual wages but he certainly could not have earned nothing at all until now if he had not preferred to remain idle. On this head of claim I would award him, in round figures, the sum of \$2,000. As regards general damages, the loss of effective use of his hand, as a direct result of his actual injuries

A is no greater and no less than his present disability after amputation. I have given careful consideration to his past employment, his present circumstances and his future prospects of earning his living. For pain and suffering, reduction of future earnings, disability and loss of amenities, I think that, having regard to all the circumstances, a sum of \$10,000 is a fair and proper compensation. There will be judgment accordingly in favour of the plaintiff for \$12,298 and costs.

Judgments for the plaintiff.

Solicitors: *Sen & Lim; Donaldson & Burkinshaw.*

LIAN BOON KHIAM & ORS. v. REGINA

[R. Cr. J. (Rose C.J.) August 31, 1961]

[Singapore — Criminal Revision No. 8 of 1961]

Criminal Law and Procedure — Preliminary Inquiry — Order of discharge recorded by Magistrate — Whether order can be varied — Criminal Procedure Code, (Cap. 132), s.139(1).

In matters which come before a Magistrate by way of a preliminary inquiry, section 139(1) of the Criminal Procedure Code leaves him with no discretion but to record an order of discharge whenever he finds that there are not sufficient grounds for committing the accused for trial. Such an order of discharge cannot be revised by the High Court so as to substitute an order of acquittal in its place.

CRIMINAL REVISION.

S. K. Lee for the petitioners.

A. W. Ghows (Senior Crown Counsel) for the respondent.

Cur. Adv. Vult.

Rose C.J.: This is an application in revision. The three petitioners were charged before the 9th Magistrate's Court with voluntarily causing grievous hurt for the purpose of extortion contra section 331 of the Penal Code.

After four adjournments, made at the request of the prosecution, the matter was eventually disposed of on the 10th of June, 1961 when the charge against the petitioners was withdrawn and the learned Magistrate recorded an order of discharge not amounting to an acquittal.

The petitioners now ask that I should exercise my powers of revision on their behalf under section 311 of the Criminal Procedure Code and record an acquittal in place of the order of discharge.

It is no doubt the case that in summary trials before a Magistrate or in prosecutions before an Assize Court or a District Court a discretion is vested in the Court as to whether to record an order of discharge or one of acquittal. Moreover it is the general practice, which has